

E-filing

**PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY**Name HERNANDEZ, PETER

(Last)

(First)

(Initial)

Prisoner Number C-03015Institutional Address CTF-C, P.O. Box 689, Soledad, CA 93960**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**PETER HERNANDEZ,

(Enter the full name of plaintiff in this action.)

vs.

B. CURRY, Warden, et al.,

(Enter the full name of respondent(s) or jailor in this action)

CV 08

2278

Case No. \_\_\_\_\_

(To be provided by the clerk of court)

**PETITION FOR A WRIT  
OF HABEAS CORPUS****(PR)****Read Comments Carefully Before Filling In****When and Where to File**

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

Who to Name as Respondent

You must name the person in whose actual custody you are. This usually means the Warden or jailor. Do not name the State of California, a city, a county or the superior court of the county in which you are imprisoned or by whom you were convicted and sentenced. These are not proper respondents.

If you are not presently in custody pursuant to the state judgment against which you seek relief but may be subject to such custody in the future (e.g., detainers), you must name the person in whose custody you are now and the Attorney General of the state in which the judgment you seek to attack was entered.

A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

1. What sentence are you challenging in this petition?

(a) Name and location of court that imposed sentence (for example; Alameda County Superior Court, Oakland):

Los Angeles County Superior Ct.      Los Angeles, CA 90012

Court

Location

(b) Case number, if known A-334928

(c) Date and terms of sentence Mar. 9, 1979/seven(7) to Life

(d) Are you now in custody serving this term? (Custody means being in jail, on parole or probation, etc.)      Yes XX      No \_\_\_\_\_

Where?

Name of Institution: Correctional Training Facility

Address: P.O. Box 689, Soledad, Calif. 93960

2. For what crime were you given this sentence? (If your petition challenges a sentence for more than one crime, list each crime separately using Penal Code numbers if known. If you are challenging more than one sentence, you should file a different petition for each sentence.)

P.C. § 187, murder in the first degree

(sentenced under P.C. § 1168)

3. Did you have any of the following?

Arraignment: Yes XX No       

Preliminary Hearing: Yes xx No     

Motion to Suppress: Yes \_\_\_\_\_ No xx

4. How did you plead?

Guilty \_\_\_\_\_ Not Guilty XX Nolo Contendere \_\_\_\_\_

Any other plea (specify) \_\_\_\_\_

5. If you went to trial, what kind of trial did you have?

Jury XX Judge alone \_\_\_\_\_ Judge alone on a transcript \_\_\_\_\_

6. Did you testify at your trial? Yes XX No       

7. Did you have an attorney at the following proceedings:

(a) Arraignment Yes X No       

(b) Preliminary hearing Yes X No       

(c) Time of plea Yes x No       

(d) Trial Yes X No \_\_\_\_\_

(e) Sentencing Yes X No       

(f) Appeal Yes X No \_\_\_\_\_

(g) Other post-conviction proceeding Yes \_\_\_\_\_ No XX

8. Did you appeal your conviction? Yes X No \_\_\_\_\_

(a) If you did, to what court(s) did you appeal?

Court of Appeal Yes X No       

Year: \_\_\_\_\_ Result: N/A

Supreme Court of California Yes X No       

Year:	Result:	N/A
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Any other court Yes \_\_\_\_\_ No XX

Year: \_\_\_\_\_ Result: \_\_\_\_\_

(b) If you appealed, were the grounds the same as those that you are raising in this

petition? Yes \_\_\_\_\_ No XX

(c) Was there an opinion? Yes XX No \_\_\_\_\_

(d) Did you seek permission to file a late appeal under Rule 31(a)?

Yes \_\_\_\_\_ No XX

If you did, give the name of the court and the result:

\_\_\_\_\_  
\_\_\_\_\_

9. Other than appeals, have you previously filed any petitions, applications or motions with respect to this conviction in any court, state or federal? Yes XX No \_\_\_\_\_

[Note: If you previously filed a petition for a writ of habeas corpus in federal court that challenged the same conviction you are challenging now and if that petition was denied or dismissed with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider this petition. You may not file a second or subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28 U.S.C. §§ 2244(b).]

(a) If you sought relief in any proceeding other than an appeal, answer the following questions for each proceeding. Attach extra paper if you need more space.

I. Name of Court: Los Angeles County Superior Court

Type of Proceeding: habeas corpus petition

Grounds raised (Be brief but specific):

a. state/federal denial of due process

b. state/federal denial of equal protection

c. \_\_\_\_\_

d. \_\_\_\_\_

Result: petition denied Date of Result: 9-24-07

II. Name of Court: Second Dist. Court of Appeals/Div 1

Type of Proceeding: habeas corpus petition

Grounds raised (Be brief but specific):

1 a. (See attached)

2 b.

3 c.

4 d.

5 Result: denied Date of Result: 1-11-08

6 III. Name of Court: California Supreme Court

7 Type of Proceeding: Petition for Review

8 Grounds raised (Be brief but specific):

9 a. (See attached copy of writ and Exhibits)

10 b.

11 c.

12 d.

13 Result: denied Date of Result: 3-19-08

14 IV. Name of Court: \_\_\_\_\_

15 Type of Proceeding: \_\_\_\_\_

16 Grounds raised (Be brief but specific):

17 a.

18 b.

19 c.

20 d.

21 Result: \_\_\_\_\_ Date of Result: \_\_\_\_\_

22 (b) Is any petition, appeal or other post-conviction proceeding now pending in any court?

23 Yes \_\_\_\_\_ No xx

24 Name and location of court: \_\_\_\_\_

25 B. GROUNDS FOR RELIEF

26 State briefly every reason that you believe you are being confined unlawfully. Give facts to  
27 support each claim. For example, what legal right or privilege were you denied? What happened?

28 Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

1 need more space. Answer the same questions for each claim.

2 [Note: You must present ALL your claims in your first federal habeas petition. Subsequent  
3 petitions may be dismissed without review on the merits. 28 U.S.C. §§ 2244(b); McCleskey v. Zant,  
4 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).]

5 Claim One: \_\_\_\_\_ (SEE ATTACHED PAPERWORK)

6  
7 Supporting Facts: \_\_\_\_\_

8  
9  
10  
11 Claim Two: \_\_\_\_\_

12  
13 Supporting Facts: \_\_\_\_\_

14  
15  
16  
17 Claim Three: \_\_\_\_\_

18  
19 Supporting Facts: \_\_\_\_\_

20  
21  
22  
23 If any of these grounds was not previously presented to any other court, state briefly which  
24 grounds were not presented and why:

25 All issues presented herein are fully exhausted.



1 List, by name and citation only, any cases that you think are close factually to yours so that they  
2 are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning  
3 of these cases:

4 Martin v. Marshall (N.D. Cal. 2006) 431 F.Supp.2d 1038

5 Rosenkrantz v. Marshall (C.D. Cal. 2006) 444 F.Supp.2d 1063

6 In re Scott (2005) 133 Cal.App.4th 573

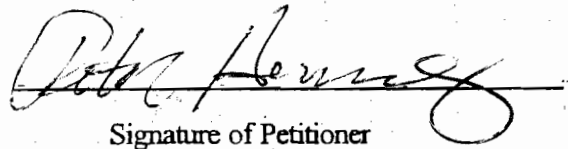
7 Do you have an attorney for this petition? Yes \_\_\_\_\_ No X

8 If you do, give the name and address of your attorney:

9 \_\_\_\_\_  
10 WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in  
11 this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

12  
13 Executed on April 20, 2008

14 Date

  
Signature of Petitioner

15  
16  
17  
18  
19  
20 (Rev. 6/02)

ATTACHMENT



Court of Appeal, Second Appellate District, Div. 1 - No. B202757  
S160160

**IN THE SUPREME COURT OF CALIFORNIA**

**En Banc**

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In re PETER HERNANDEZ on Habeas Corpus

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The petition for review is denied.

**SUPREME COURT  
FILED**

**MAR 19 2008**

Frederick K. Ohlrich Clerk

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Deputy

**GEORGE**

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Chief Justice

This petition concerns:

- ☐ A conviction
 ☒ Parole  
☐ A sentence
 ☐ Credits  
☐ Jail or prison conditions
 ☐ Prison discipline  
☒ Other (specify): state and federal denial of due process and equal protection

1. Your name: Peter Hernandez
2. Where are you incarcerated? Correctional Training Facility, Soledad, CA 93960
3. Why are you in custody? ☒ Criminal Conviction ☐ Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

- a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

Homicide of the first degree, Assault w/intent to commit murder, firearm use

- b. Penal or other code sections: §§ 187, 217, 12022.5, 1203.06(a)(1) [under P.C. §1168]

- c. Name and location of sentencing or committing court: L.A. County Superior Court,  
111 N. Hill St., Los Angeles, CA 90012-3014

- d. Case number: A-334928

- e. Date convicted or committed: Mar. 9, 1979

- f. Date sentenced: Mar. 15, 1979

- g. Length of sentence: Seven (7) years to Life

- h. When do you expect to be released? Unknown, M.E.P.D.: 9-3-1985

- i. Were you represented by counsel in the trial court? ☒ Yes. ☐ No. If yes, state the attorney's name and address:

Mr. Kenneth Cotton, L.A. County Public Defender,

4. What was the LAST plea you entered? (check one)

☒ Not guilty ☐ Guilty ☐ Nolo Contendere ☐ Other: \_\_\_\_\_

5. If you pleaded not guilty, what kind of trial did you have?

☒ Jury ☐ Judge without a jury ☐ Submitted on transcript ☐ Awaiting trial

## 6. GROUNDS FOR RELIEF

**Ground 1:** State briefly the ground on which you base your claim for relief. For example, "the trial court imposed an illegal enhancement." (If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page four. For additional grounds, make copies of page four and number the additional grounds in order.)

PETITIONER'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION WERE VIOLATED BY RESPONDENTS WHEN THEY DENIED TO HIM THE INDIVIDUALIZED CONSIDERATIONS MANDATED AND REQUIRED BY STATUTORY AUTHORITIES AND ALL THE CLEARLY ESTABLISHED FEDERAL LAWS

## a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: *who did exactly what to violate your rights at what time (when) or place (where).* (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)

In August of 1988 and again in January of 1990, Peter Hernandez, (Petitioner), was found suitable for parole. Those Grants were subsequently reversed and are attached as Exhibit "A".

On July 13, 2006, Petitioner appeared before the Board of Parole Hearings (BPH) for his 13th subsequent hearing (14th overall), during which Mr. J. Davis was Presiding Commissioner and Mr. D. Smith was Deputy Commissioner. A copy of the Hearing transcript is attached hereto as Exhibit "B", and incorporated by reference to bolster a claim of a "no parole" policy and/or practice which has been found to be patently unconstitutional by numerous state and federal courts.

Petitioner was represented by Ms. K. Rutledge. A staff psychologist, Dr. E.W. Hewchuk, Ph.D., testified utilizing a filed Report dated: 7-23-04, that in his opinion Petitioner is NOT a risk of CURRENT  
(continued on attached pages)

## b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

(SEE ATTACHED POINTS AND AUTHORITIES)

(continued from previous page):

danger to the public safety. A copy of that Report and Reports from 2004, 2002, 1999 and 1997 are attached as Exhibit "C". A copy of the 2006 Correctional Counselor Level I report was prepared and filed but not cited to and is attached hereto as Exhibit "D".

Copies of the 2005 and 2003 Decisions denying parole are attached as Exhibit "E" and are clearly anecdotal evidence to further advance the allegation of a "no parole" policy and/or practice that has been held to be unconstitutional as well as illegal by all courts that have ruled on the subject matter. With the Court's leave, Petitioner respectfully requests that this anecdotal evidence be incorporated to this pleading.

Also present at the hearing was Mr. P. Turley, deputy district attorney for Los Angeles county, parole division.

California's parole statutes and regulations bestow on life prisoners a liberty interest in parole protected by due process. McQuillen v. Duncan (9<sup>th</sup> Cir. 2002) 306 F.3d 895, 901-903; In re Rosenkrantz<sup>1</sup> (2002) 29 Cal.4<sup>th</sup> 616, 661 [Rosenkrantz V]. Petitioner's liberty interest required the BPH panel to find him suitable for parole and set his prison term and a parole date because, when his MEPD lapsed, his parole was evaluated to no longer pose an unreasonable risk of danger to society or public safety. (Penal Code (PC) §3041(a); 15 California Code of Regulations (CCR) §§ 2280, 2281(a).)

In some cases, a lifer who otherwise qualifies for parole may be found unsuitable for and denied parole if the commitment offense was especially egregious when compared to other instances of the same offense. Such cases, however, are *exceptions*, not per the rule. Accordingly, the conduct of a to-life sentenced inmate who committed first degree murder **must** be especially violent when compared to that of other first-degree murderers for parole to be denied on the basis of the offense in the case of an otherwise qualified inmate. However, the offense cannot serve as a basis for denying parole interminably. In re Ramirez (2001) 94 Cal.App.4<sup>th</sup> 549, 569-570; Rosenkrantz II, 658; (cf: Biggs v. Terhune (9<sup>th</sup> Cir. 2003) 34

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<sup>1</sup> There have seven (7) "Rosenkrantz" decisions: People v. Rosenkrantz (1988) 198 Cal.App.3d 1187; In re Rosenkrantz (2000) 80 Cal.App.4<sup>th</sup> 409; Davis v. Superior Court (2-22-01, B146421 [non-pub.]); In re Rosenkrantz (2002) 95 Cal.App.4<sup>th</sup> 358; In re Rosenkrantz (2002) 29 Cal.4<sup>th</sup> 616; In re Rosenkrantz L.A. County Sup.Ct. no. BH003529, filed 6-26-2006; Rosenkrantz v. Marshall (2006) 444 F.Supp.2d 1063.



F.3d 910); Irons v. Warden (E.D. Cal. 2005) 358 F.Supp.2d 936; Martin v. Marshall (N.D. Cal. 2006) 431 F.Supp.2d 1038 (Martin I); In re Rosenkrantz (C.D. Cal. 2006) 444 F.Supp.2d 1063, 1081 [Rosenkrantz VII].

Substantive due process requires that the grounds set forth by a BPH panel for its decision must be supported by at least some credible, relevant evidence in the record. The panel was required to base its findings on a weighing of all relevant, reliable evidence. (15 CCR § 2281(b); In re Minnis (1972) 7 Cal.3d 639, 646; In re Rosenkrantz (2000) 80 Cal.App.4<sup>th</sup> 409, 424-427 (Rosenkrantz I); Rosenkrantz II, 655; Ramirez, supra, 566. The "some evidence" standard is satisfied if there is reliable evidence in the record that could support the conclusion reached. Powell v. Gomez (9<sup>th</sup> Cir. 1994) 33 F.3d 39, 40; Cato v. Rushen (9<sup>th</sup> Cir. 1987) 824 F.2d 703, 705. And federal due process requires *substantial* evidence having indicia of reliability Jancsek v. Oregon Bd. Of Parole (9<sup>th</sup> Cir. 1987) 833 F.2d 1389, 1390; In re Powell (1988) 45 Cal.3d 894, 904; In re Rosenkrantz II, 658; McQuillen, supra, 306; Biggs, supra, 915; Caswell v. Calderon (9<sup>th</sup> Cir.2004) 363 F.3d 832, 839.

Black's Law Dictionary 5<sup>th</sup> Ed. 1979 defines SUBSTANTIAL EVIDENCE as follows: "Such evidence that a reasonable mind might accept as adequate to support a conclusion. *It is that quality of evidence necessary for a court to affirm a decision of an administrative board.* (Black's p. 1281, citing State v. Green (1974) 544 P. 2d 356, 362. Emphasis added.)

The Due Process clause of the Fourteenth Amendment prohibits state action that deprives a person of life, liberty, or property without due process of law. A person alleging a due process violation must first demonstrate that he or she was deprived of a liberty or property interest protected by the Due Process Clause, and then show that the procedures that led to the deprivation were constitutionally insufficient. Kentucky Dept. of Corrections v. Thompson (1989) 490 U.S. 454; McQuillen, supra, 900.

In the parole context, a prisoner alleging a due process claim must demonstrate the existence of a protected liberty interest in parole, and the denial of one or more of the procedural protections that must be afforded when a prisoner has a liberty interest in parole. The Supreme Court held in 1979, and reiterated in 1987, that "a state's statutory scheme, if it uses mandatory language, creates a presumption that parole release will be granted when or unless certain designated findings are made, and thereby gives rise to a constitutional liberty interest." McQuillen, supra, 901 (citing Greenholtz v. Nebraska Penal Inmates (1979) 442 U.S. 1, 7 and Board of Pardons v. Allen (1987) 482 U.S. 369, 373. Because no evidence supported the panel member's finding that Petitioner's parole poses an "unreasonable risk of danger to society" or to

1 "public safety," and the finding was inapposite to the record, parole denial on that basis subverted due  
2 process.

3 The reason stated by the panel for finding Petitioner unsuitable was BPH's boilerplate statement that  
4 his parole "would pose an unreasonable risk of danger to society or a threat to public safety." (Exhibit "A", p.  
5 70,) the sole ground set forth by the panel in support of its Decision to AGAIN, for at least the fourteenth  
6 (14<sup>th</sup>) time, deny suitability and dismiss his warrant of parole which is tremendously long overdue!

7 (His M.E.P.D. was on the 9<sup>th</sup> of September, 1985!!)

8 Parole denial based on the "unreasonable risk" subterfuge abandoned principles of independence  
9 and abrogated due process because it is supported by **NO EVIDENCE** whatsoever. All of the competent,  
10 professionally-sanctioned evidence that addresses Petitioner's current and future dangerousness, parole  
11 risk, etc., found it to be "low," "below average," or "no more than the average citizen," nor has it been for over  
12 a score years. (See Exhibit "C", throughout, Exhibit "A", at pp. 45-46.)

13 Utilizing the legal precedent established as the focal criteria, all relevant, reliable evidence in  
14 Petitioner's records that addresses his dangerousness and parole "risk" all assess these factors to be low,  
15 and because not a scintilla of reliable, relevant evidence supports the panel's flawed findings, the sole  
16 relevant reason for finding him unsuitable for parole sensibly suggests this was an illegitimate (ongoing)  
17 basis for denial. Martin v. Marshall (N.D. Cal. 2006) 448 F.Supp.2d 1143, (Martin II), et al.

18 In Martin, supra, Justice Patel found NO justification for the panel's boilerplate lack of individual  
19 consideration and in her July 21, 2006 Memorandum and Order she stated:

20 "In light of the Board's apparent abandonment of its independent role

21 **—which occurred AFTER Governor Schwarzenegger took office,**

22 *the court finds that a remand would indeed be futile.*" There can be no question but that the  
23 implication here is exactly what it means: NO INDEPENDENT PAROLE DECISION BY THE WILSON,  
24 DAVIS, OR SCHWARZENEGGER regimes for this Petitioner. Id. at p. 1144. (Emphasis added.)

25 In Rosenkrantz II, supra, at p. 655, the Supreme Court explained that parole release decisions  
26 "entail the [BPH]'s attempt to predict by subjective analysis whether the inmate will be able to live in society  
27 without committing additional antisocial acts."

28 Such a prediction requires analysis of individualized factors on a case-by-case basis and the BPH's

discretion in that regard is almost but NOT unlimited. Further, regardless of the tenet that the BPH's discretion is exceedingly broad, it is circumscribed by the requirements of procedural due process. (Rosenkrantz, *id.*, Calif. Const. article I, § 7(a), and statutory directives.)

Absent reliable evidence of the presence of unsuitability factors, there must be some relevant, reliable evidence that a petitioner is otherwise unsuitable for parole, such as by his having failed to meet the suitability criteria under 15 CCR § 2402, subd. (d); §§ 1-4, 6-9. And, while the BPH has exceedingly broad discretion in its parole decisions, the Findings must reflect "*an individualized consideration of the specified criteria and cannot be arbitrary or capricious.*" Rosenkrantz V, *supra*, 677; "[t]he liberty interest is created, not upon the grant of a parole date, but upon the incarceration of the inmate." Biggs, *supra*, p. 914.

The failure to properly consider the post-incarceration factors highlights the inherent misunderstanding and application of the "some evidence" standard and triggers the required scope of judicial review of the federal questions presented here.

There are two sets of parole criteria regulations, not one. 15 CCR §§ 2402, subd. (c) [Circumstances Tending To Show Unsuitability], and 2402 subd. (d) [Circumstances Tending To Show Suitability]. It appears that the BPH's focused emphasis has been on, and remains on, subdivision (c), with little or no regard given to subdivision (d). Petitioner asserts, as a matter of statutory construction, the "public safety" concern in PC § 3041(b), demands an equal (or neutral) emphasis at the outset of a panel's deliberations AND on its Findings under both sets of criteria and any balanced and reasonable interpretation should compel this approach throughout the entire process due any inmate and to do so would virtually assure a Finding of suitability.

Factors TENDING to show suitability or unsuitability must be weighed and balanced within the parameters of a standard of proof. Without this critical, reliable component, the process is inherently arbitrary, capricious, and defective. This standardless analysis would vitiate the individualized consideration held appropriate in Rosenkrantz II. The crux of the matter is that of a standard of proof with indicia of reliability as set forth below and reinforced with significant legal precedent.

The "some evidence" standard is NOT the sole standard of evidence to be applied to the BPH's decisions. It is only one aspect of *judicial* review employed by a habeas court. Edwards v. Balisok (1997) 520 U.S. 640, 647. And, if the Rosenkrantz II decision implies, as it does, that the "some evidence" standard



1 should be applied to the BPH Findings, then this is a clear and unreasonable application of well-established  
2 federal Constitutional law set forth by the High Court. Nothing in Superintendent v. Hill (1985) (Hill) 472 U.S.  
3 445, 456, implies that it IS A STANDARD OF EVIDENCE to be applied by any agency, board, or executive  
4 body outside a disciplinary committee within an exigent-circumstances prison setting that has no pressing  
5 need for more formal evidentiary standards or anything warranting standardless precedents

6 What IS implied by the Rosenkrantz II court, when it held that a habeas court can't reverse a  
7 decision denying parole even if it determines that the evidence overwhelmingly preponderates towards a  
8 finding of suitability is completely unreasonable because it prevents effective habeas relief from an arbitrary  
9 and capricious decision, and worse, stymies effective judicial review. This court is not obliged nor compelled  
10 to defer to a state decision misapplying federal constitutional principles. Hubbart v. Knapp (9<sup>th</sup> Cir. 2004) 379  
11 F.3d 773, 780; referencing Mullaney v. Wilbur 421 U.S. 684, 691; see also Peltier v. Wright (9<sup>th</sup> Cir. 1994) 15  
12 F.3d 860, 862.

13 In Oxborrow v. Eikenberry (9<sup>th</sup> Cir. 1989) 877 F.2d 1395, 1399, the Circuit held that: "Our deference  
14 to the [state court] is suspended only upon a finding that the court's interpretation of [state law] is untenable  
15 or amounts to a subterfuge to avoid federal review of a constitutional violation." Thus, it is petitioner's  
16 contention that respondents seek to avoid federal review by asserting that the "some evidence" standard 1)  
17 is applied by the BPH and/or, 2) limits judicial review ONLY to the BPH's ultimate decision and not to a  
18 finding of a defective pre-Decision process.

19 If Petitioner were the beneficiary of an individualized consideration utilizing real evidence with  
20 reliable, articulable proof, it would have logically flowed that he is now MORE suitable than his previous  
21 hearings wherein he was found suitable. (Exhibit "A"). All those laudatory words at his Hearing would have  
22 had a consistent ring of truth to them in that he has progressed towards a more-suitable mien, not the  
23 reverse. This highly illegal "boilerplate" denial now rises to the level of a federal due process violation. Biggs,  
24 supra, 916-917; Martin, supra, 1046-1048.

25 The High Court in Greenholtz (at p. 7) Allen (at p. 373) , supra, established that:

26 "While there is no constitutional or inherent right of a convicted person to be conditionally  
27 released before the expiration of a valid sentence, a state's statutory scheme, if it uses  
28 mandatory language, creates a presumption that parole release will be granted when or  
unless certain designated findings are made, and thereby gives rise to a constitutional  
liberty interest." (citing McQuillen, supra, at 901.)

In the absence of any evidence in the record supporting the BPH's decision, remanding the case back to be reheard is a futile act, and the appropriate remedy is release of the Petitioner. McQuillen II, supra, p. 1015-15; Martin II, supra, 1144-45; Rosenkrantz VII, supra, 1087.

A petitioner is entitled to "something more than mere pro forma consideration.", e.g. meaningful individual consideration. Not a sham hearing using rote words and repeating boilerplate from a pre-printed form. The only mandate "normally" being followed under P.C. § 3041 (a), is a multi-year denial under § 3041 (b) to "swallow" the due process required under the 14<sup>th</sup> Amendment, an ingestion violating the equal protection guarantees and abridges Petitioner's civil rights under both state and federal Constitution's proscription against this tactic for all similarly-situated inmates. In re Sturm (1974) 11 Cal.3d 258, 268; Ramirez, supra, at 570; Rosenkrantz V, at pp. 658, 683:

"Judicial oversight must be extensive enough to protect the limited right of parole applicants "to be free from an arbitrary parole decision ... and to something more than mere pro forma consideration." [citation omitted] The courts may properly determine whether the [BPH]'s handling of parole applications is consistent with the parole policies established by the Legislature. [ ] while courts must give great weight to the [BPH]'s interpretation of the parole statutes and regulations, final responsibility for interpreting the law rests with the courts. [ ] Courts must not second-guess the [BPH]'s evidentiary findings [ ] However, it is the proper function of judicial review to ensure that the [BPH] has honored in a "practical sense" the applicant's right to "due consideration." [ ] Ramirez supra, at 564.

Since it is clear that parole should be the rule and not the exception, a moderate or average risk cannot be construed as "unreasonable." Were an average risk grounds for parole denial, then the exception would "operate so as to swallow the rule that parole is 'normally' to be granted.

"All violent crime demonstrates the perpetrator's potential for posing a grave risk to public safety ... {However} the [BPH] "shall normally set a release date." [citation omitted] The [BPH]'s authority to make an exception ... should not operate to swallow the rule that parole is 'normally' to be granted. ... Therefore, a life term offense must be *particularly egregious* to justify the denial of a parole date. In order to comply with the parole policy established by the Legislature in P.C. § 3041, the [BPH] must weigh the inmate's criminal conduct not against ordinary social norms, but against other instances of the same crime or crimes." (Ramirez, supra, at 570, disapproved on other grounds, Emphasis added as usual in published cases.)

The applicability of this standard to the review of decisions applies and Petitioner's right to due consideration does not appear to have been honored in any practical sense by the panel in this case and their Decision is facially and legally deficient. In the instant case the BPH made no effort to comply with the controlling rules and seems to have merely stated its "predetermined conclusion." (See: In re Caswell

(2001) 94 Cal.App.4th 1017, 1030.)

In In re Smith (2003) (Smith II) 114 Cal.App.4th 343, 369, the Sixth District Court of Appeals found that there was not some evidence that Smith's crime was more callous than the average for this type of crime. There was nothing to "distinguish th[e] crime from other [serious] murders [involving a gun] ... the record provides no reasonable grounds to reject, or even challenge, the findings and conclusions of the psychologist and counselor[s] concerning [his] dangerousness."

Surely the same must appear to be true here. (See Exhibits "C" and 2004 Correctional Counselor's Report, Exhibit "F", attached.) The Second District Court of Appeals, in the case of another life-term inmate named Smith similarly found no evidence to support a parole denial based on the commitment offense. In re Smith (2003) (Smith I) 109 Cal.App.4th 489.

Compare In re Scott (2004) 119 Cal.App.4th 871, 876-877 [Scott I], where the First District reversed the BPH's standard statement of reliance on the gravity of the crime because in truth, "the relevant evidence show[ed] no more callous disregard for human suffering than is shown by most [ ] murder offenses. (Governor's rescission of Scott's parole unanimously reversed on 10-18-05, see: In re Scott 133 Cal.App.4th 538, Scott II.)

On 5-18-05, in Coleman v. BPT (E.D. Cal. No. 97-0783), Honorable Judge L. Karlton adopted the Findings and Recommendations IN FULL. There, it was found that ex-governors Davis and Wilson (and NOW Governor Schwarzenegger, too. See *infra* at p. C), had/have panels with a sub rosa "no parole" policy and were/are carrying it out. Martin I *supra*, 1048-49, Martin II, *supra*, 1144; see Coleman and Final Order, attached as Exhibit "G".

It is beyond debate that neither a state agency interpreting an enabling statute nor any court of the state can construe a statute contrary to Legislative intent or the ordinary meaning of the words used in a statute. Our Court, in the entire history of the statute, has never construed it with any adequacy according to the plain meaning to create guidance and instill compliance by both the BPH panels and those who serve the governors otherwise.

Instead, this lack of judicial construction has led to the many years of overwhelming denials that DO NOT reflect in any clear way the presumptions of § 3041. Nor does it reflect instruction as to what the agency's burden of proof is or the legal significance of relevant, reliable, or material evidence. This lack of



judicial guidance has left unfettered discretion in the hands of lay appointees to determine the legal import of evidence (or lack thereof) although these persons are arguably unqualified by a dearth of professional standing to make these determinations upon which a federal liberty interest depends.

Determining the legality and weight and of evidence requires some specific legal training in evidentiary law; not by lay persons, and which lack of training is visibly evident in the incongruously inapposite findings thus made. (McQuillen I, supra, 907-912; Rosenkrantz II, supra, 680; Rosenkrantz I, supra, 424-426; Smith II, supra, 361; Smith I, supra, 501-506.) These are only a few of the published cases but unpublished absurdities exponentially abound!

The Sixth district held for the proposition in Smith II at 361 that "[t]he weight given the specified factors relevant to parole suitability lies within the discretion of the BP[H]."; a court's determination "of whether the *preponderance of the evidence* supports a finding of suitability is irrelevant." (Emphasis added.) This is the first time a published decision on the BPH has even mentioned a burden of proof. This reference infers the BPH must honor this evidentiary standard as faithfully to the letter as legally possible.

Yet there is no settled bright line rule for a court to determine if the BPH has met that standard. Just the opposite, in fact, since Smith II strongly suggests that even if a reviewing court finds the agency did not meet the standard, an allegation of "some evidence" is sufficient to automatically require judicial deference.

The Third District Court of Appeals stated the following as fact:

"It is without doubt that a blanket no-parole policy would be contrary to the law, which contemplates that persons convicted of murder without special circumstances may eventually become suitable for parole and that, when eligible, they should be considered on an individualized basis. Thus, blanket policies have long been deemed to be improper. ¶ In Roberts v. Duffy (1914) 167 Cal. 629, a decision that predates the enactment of our state's old indeterminate sentencing law, the Court condemned a blanket parole policy that was contrary to the statutory parole scheme then in place. It appeared that the statutory law *allowed a prisoner to apply for parole after serving ONE YEAR* but that, **contrary to the statute, the parole authority adopted a rule precluding application until one-half the sentence was served.**

The Court held that, "while the prisoner had no right to apply to release on parole at any time, **he was entitled to apply** and have his application duly considered on an individualized basis." Id. at 640-641.

(Does this sound familiar? Emphasis added to original citation.)

"With respect to persons sentenced to indeterminate terms, the purpose of punishment is satisfied by the requirement of service of a minimum period before eligibility for parole and, when suitable for parole, by determination of a release date **in a manner that will provide**

UNIFORM TERMS for offenses of similar gravity and magnitude with respect to their threat to the public." (P.C. §§ 3041, 3041(a), 3041.5, citing In re Morrall (2002) 102 Cal.App.4<sup>th</sup> 280, 291-292.)

The arbitrary or capricious misapplication of statutory law violates both state and federal due process. Hill, supra, at p. 428; Gordon v. Duran (9<sup>th</sup> Cir. 1990) 895 F.2d 610, 613; In re Edsel P. (1985) 165 Cal.App.3d 763, 779. "The touchstone of due process is protection of the individual against [the] arbitrary action of government." Wolff v. McDonnell (1974) 418 U.S. 539, 558.)

These principles apply in equal force to incarcerated prisoners. (In re Jones (1962) 57 Cal.2d 860, 862; ["a convicted felon, although civilly dead, is nevertheless a 'person' entitled to protection of the 14<sup>th</sup> Amendment."]; In re Price (1979) 24 Cal.3d 448, 453 [acknowledging that P.C. § 2600 limits a prisoner's deprivation to only such rights "as is necessary in order to provide for the reasonable security of the institution in which he is confined."].)

In interpreting a prisoner's rights of substantive due process the High Court has held that a prisoner may derive a due process liberty interest from administrative regulations, as well as state law and the U.S. Constitution. Sandin v. Conner (1995) 515 U.S. 472, 484; Hewitt v. Helms 459 U.S. 460, 469, receded from on p. 484, fn. 5; Meachum v. Fano (1976) 427 U.S. 215, 226; Wolff, supra, at p. 557. In applying these standards here, the BPH violated Petitioner's right to constitutional due process but he is not challenging the BPH's right to conduct professional psychological assessments as the main focus of the parole evaluation process, but does challenge their "normal" practice of summarily dismissing and patently ignoring their own experts.

Predictions of future conduct necessarily relate to public safety concerns but Judge Karlton in Irons v. Warden (E.D. Cal. 2004) 358 F.Supp.2d 936 (9<sup>th</sup> Cir. Review pending, filed on 5-18-05, No. 05-15275), discussed this conundrum and noted that the propensity analysis thusly:

"To a point, it is true, the circumstances of the crime and motivation for it may indicate a petitioner's instability, cruelty, impulsiveness, violent tendencies and the like. However, after 15 or so years in the cauldron of prison life, not exactly an ideal therapeutic environment to say the least, and after repeated demonstrations that despite recognized hardships of prison, [petitioner] does not possess these attributes, the predictive ability of the circumstances of the crime is near zero."<sup>2</sup>

<sup>2</sup> "It is worth noting, as has our [Calif.] Supreme Court (People v. Murtishaw (1981) 29 Cal.3d 733, 768, disapproved on other grounds in People v. Boyd (1985) 38 Cal.3d 762., that a large number of legal and scientific authorities believe that, even where the passage of time is not a factor and the assessment is made by an expert, predictions of future dangerousness are exceedingly unreliable. (See, e.g., Monahan, *Violence Risk Assessment: Scientific Validity and Evidentiary Admissibility*, 57 Wash. & Lee L. Rev. 901 (2000); Otto, *On the Ability of Mental Health Professionals to Predict Dangerousness*, 18 Law & Psychol. Rev. 43 (1994); Lidz, et al., *The Accuracy of Predictions of Violence to Others*, 269 Jour.Am.Med.Assn. 1007 (1993); Diamond, *The Psychiatric Prediction of Dangerousness*, 123 Pa.L.Rev. 439 (1974); Dershowitz, *The Law of Dangerousness: Some Fictions About*

(Irons, supra, at p. 947, fn. 2, this 'dicta' was also cited as Headnote #10 at p. 937; see additional discussion of "need for more therapy" used as a ruse to deny suitability at p. 948.)

P.C. § 3041(a) governs parole suitability determination processes and does not define more than one class of persons. The statute generalizes that its focus is "any prisoner" who is serving an indeterminate term. Through application, however, the agency's discrimination amongst the class serving indeterminate sentences is in violation of the right to equal protection ensconced in the Fourteenth Amendment. Equal protection is "[in essence] a direction that [a person] similarly situated should be treated alike." (*City of Cleburne v. Cleburne Living Ctr.* (1985) 473 U.S. 432, 439, citing *Plyler v. Doe* (1982) 457 U.S. 202, 216, "To state a claim ... for violation of the Equal Protection Clause of the 14<sup>th</sup> Amendment a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." *Barren v. Harrington* (9<sup>th</sup> Cir. 1998) 152 F.3d 1193, 1194, cert. denied 525 U.S. 1154 (1999).)

Strict scrutiny, alternatively, is utilized if the government distributes benefits or burdens in a manner inconsistent with fundamental rights. (See *Sosna v. Iowa* (1975) 419 U.S. 393; *Shapiro v. Thompson* (1969) 394 U.S. 618.) The fundamental right here is the due process right to relevant, reliable evidence being considered when analyzing a right to release on parole. *McQuillen I*, supra, at 900; *McQuillen II*, supra, at 1012; *Martin I*, supra, at 1043: ("[T]he deferential 'some evidence' standard has outer limits. [citing *Coleman*, supra, with approval slip op. at 9] If it is established that a particular judgment was predetermined, then a prisoner's due process rights will have been violated even if there is 'some evidence' to support the decision. [See *Bakalis v. Golembeski* (7<sup>th</sup> Cir. 1994) 35 F.3d 318, 326] (a decision-making "body that has prejudged the outcome cannot render a decision that comports with due process. ... The California Supreme Court has explicitly stated that a blanket no-parole policy as to a certain category of prisoners is illegal. [*In re Minnis*; *In re Morral*] " ... Because petitioner cannot change the past, denying [P]etitioner parole based only on the facts surrounding the crime itself effectively changes his sentence ...

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*Predictions* (1970) 23 J. Legal Ed. 24. According to a Task Force of the American Psychiatric Assn., "[n]either psychiatrists nor anyone else have demonstrated an ability to predict future violence or dangerousness. (Am.Psych.Assn., Task Force Rpt. 8, *Clinical Aspect of the Violent Individual* (1974) at p. 28.) As our [Calif.] Supreme Court has also noted, "the same studies which proved the inaccuracy of psychiatric predictions [of dangerousness] have demonstrated BEYOND DISPUTE the no less disturbing manner in which such prophecies consistently err: they predict acts of violence which will not take place ('false positives', thus branding as 'dangerous' many persons who are in reality totally harmless. [citation.]" (*People v. Burnick* (1975) 14 Cal.3d 306, 327.) (all emphasis in original). (See: copy of Order denying Review, dated 11/30/05, Daily Journal 12/2/05, p. 13803, attached as Exhibit "B"). *Scott II*, supra, footnote #9.

1 into life imprisonment without the possibility of parole." Ibid. at 1046.) (cf: Martin II, supra, at 1144: "In sum,  
2 the Board appears to have capitulated to the blanket no-parole policy described by this court in its previous  
3 [Martin I] Order, abandoning its role as an independent assessor of petitioner's eligibility. This capitulation is  
4 particularly troubling in light of the Board' vigorous assertions of independence during the 2003 hearing."  
5 This Honorable Court should grant the writ and Order all appropriate relief including a complete discharge  
6 from custody and sanction full redress for Petitioner.

7  
8  
9 CONCLUSION

10 WHEREFORE, Petitioner respectfully submits that the writ should be granted in full and all available  
11 remedies leading to his immediate release from custody be Ordered at the earliest possible moment and  
12 forthwith. It is respectfully requested that an evidentiary hearing be Ordered as an alternative to the above  
13 should there be consideration of the "no parole" policy and/or practice by this previous administration.



7 Ground 2 or Ground \_\_\_\_\_ (if applicable)

PETITIONER'S FEDERAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTIONS WERE VIOLATED WHEN RESPONDENTS UTILIZED A LESSER STANDARD OF LEGAL PROOF REQUIRING EVIDENCE WITH SOME INDICIA OF RELIABILITY TO FIND THAT PETITIONER IS UNSUITABLE TO PAROLE AND IS THEREFORE AN UNREASONABLE RISK

a Supporting facts:

Nowhere is there any codification that avers petitioners must prove his or her suitability. Only if an inmate is found unsuitable does evidence become citable. (See Dannenberg, at 1095; Rosenkrantz at 658, 683.) Evidence must be specific, articulable, and have "some indicia of reliability." Respondents have the burden of proof to demonstrate, in the Record, why an inmate is not suitable and a denial of more than one year requires that the BPH panel state for the Record why it isn't likely that petitioners would be found suitable any time sooner. There is a wholesale vitiation going on here.

Procedural safeguards require: a hearing one year prior to the MEPD, CCR §§2268(b)[2400 et seq.], 2270(d), (e), (f); PC §3041 (a), CDC v. Morales (1995) 115 S.Ct. 1597, 1600; service and prior examination of all material considered; representation if desired.

The one-year lead on a MEPD imparts that the Legislature intended that some inmates will be suitable at an initial hearing otherwise why would such a gratuitous mandate exist? Governor's-level review presumes a neutral, well-defined, professional body that will follow all the state and federal laws. Only this practice

(continued on attached pages)

b. Supporting cases, rules, or other authority:

(SEE ATTACHED POINTS AND AUTHORITIES)

1 Ground 2, continued:

2 would meet the constitutional burden under the discretionary methods  
3 needed to quickly resolve an uncertain matter.

4 The "some evidence" relied on to deny parole must be relevant  
5 and reliable in establishing Petitioner is a current, unreasonable  
6 threat to public safety and must not be grounded in an incomplete  
7 or unreasonable assessment of the relevant factors.

8 In explaining what the "some evidence" standard meant, the  
9 Court in In re Rosenkrantz (2002) 29 Cal.4th 616 at 677, stated  
10 that "[o]nly a modicum of evidence is required." On its face, this  
11 standard could thus be seen as remarkably broad--that a scintilla  
12 of evidence (or the BPH's assessment of it)--would be enough to  
13 completely immunize BPH decisions from judicial review. However,  
14 such a reading would effectively serve to nullify the Rosenkrantz  
15 court's holding rejecting the Executive's position that factual  
16 decisions rejecting parole were immune from examination by the courts  
17 and in point of fact were required.

18 A dissection of the "some evidence" standard itself--both  
19 conceptually and through a review of the application of the  
20 Rosenkrantz' standard (and its progeny)--makes clear that this is  
21 the meaningful standard. Properly understood, it strikes an  
22 appropriate balance between judicial deference to difficult BPH  
23 decisions and the protection of constitutional liberty interests.

24 The "some evidence" standard of review is laid out here:

25 "[W]e conclude that the judicial branch is authorized  
26 to review the factual basis of a decision of the [BPH]  
27 denying parole in order to ensure that the decision comports  
28 with the requirements of due process of law, but that  
in conducting such a review, the court may inquire only  
whether some evidence in the record before the [BPH] sup-  
ports the decision to deny parole, based upon the factors

1 specified by statute and regulation. Rosenkrantz, 658.  
2 "[a]s long as the [BPH] decision reflects due consideration  
3 of the specified factors as applied to the INDIVIDUAL  
4 PRISONER in accordance with applicable legal standards,  
the court's review is limited to ascertaining whether  
there is some evidence in the record that supports the  
[BPH] decision." Id. at 677. (emphasis added).

5 Thus, the inquiry into whether there is "some evidence" is  
6 more complex than it might otherwise seem, as the standard MUST  
7 be applied within the context of the statutory framework in which  
8 it arises. This framework imposes at least 3 requirements on the  
9 "some evidence" standard if it is used to deny parole.

10 First, the BPH must base their decisions only on evidence that  
11 serves to establish that the inmate will or will not pose a  
12 continuing, "unreasonable risk of danger to society if released from  
13 prison." CCR, title 15, §2402(a), and PC §3041(b).

14 Second, the evidentiary basis for parole decisions must be  
15 based on the factors specified in the regulations after  
16 individualized considerations of all of the factors. Rosenkrantz  
17 at 677 ("The precise manner in which the specified factors relevant  
18 to parole suitability are considered and balanced lies within the  
19 discretion of the [executive branch], but the decision must reflect  
20 an individualized consideration of the specified criteria and CANNOT  
21 BE ARBITRARY AND CAPRICIOUS."); see also In re Stanley (1976) 54  
22 Cal.App.3d 1030, 1038 n.7 ("Other courts place more weight on the  
23 prisoner's record of crime. We abstain from any argument over the  
24 relative primacy of various parole factors. It is enough to say  
25 that the Adult Authority must apply all the factors.") (citing In  
26 re Minnis (1972) 7 Cal.3d 639). These factors naturally all relate  
27 to whether the inmate poses a continuing, unreasonable risk of danger  
28 to society if released from prison. (emphasis added).

1 Third, the evidence upon which the BPH relies must be relevant  
2 and reliable. CCR §2402(b) ("All relevant, reliable information  
3 available to the panel shall be considered in determining suitability  
4 for parole.") (cf. CCR §§2402(d)(1-9)).

5 In sum, a court examining parole decisions must determine  
6 whether, after all consideration of all the factors enumerated in  
7 the statute and regulations, the decision was based on: 1) some  
8 evidence; 2) a reasonable consideration of all the factors specified  
9 by the statutory guidelines; 3) evidence that is both relevant and  
10 reliable; and 4) factual determinations that suggest an inmate poses  
11 a CURRENT, UNREASONABLE THREAT TO PUBLIC SAFETY.

12 A review of the post-Rosenkrantz legal panorama reveals that  
13 California courts of appeals and federal courts have routinely  
14 applied the above boundaries and checkpoints of relevance,  
15 reliability and reasonableness to the "some evidence" standard.  
16 The California Supreme Court has so far utterly failed to establish  
17 a brightline Plimsoll mark to define the full depth of the inquiry.

18 The courts continue to assess the reasonableness of the BPH's  
19 interpretation of the facts and circumstances used to legally sus-  
20 tain a finding of parole suitability denial. The court in In re  
21 Van Houten (2004) 116 Cal.App.4th 339, 356, assessed whether the  
22 BPH was reasonably able to conclude that there was some evidence  
23 of the inmate's need of continuing therapy and her dangerousness  
24 to the public. Though it found in the affirmative, the court took  
25 a close look at whether the BPH "could reasonably conclude that  
26 [her] defense, that Manson's influence overwhelmed [her], was  
27 exaggerated such that she is fully responsible for the LaBianca  
28 murders" and whether "[t]he BPH could infer with sufficient



1 reasonably to satisfy a minimal 'some evidence' standard that  
2 [she] is a danger to the public and in need of continued therapy  
3 and programming." Her denial was affirmed with instructions.

4 Judicial inquiry into the stated reasons for parole denial  
5 have their place and numerous state and federal courts--in a wide  
6 range of contexts--have similarly held the judicial inquiry into  
7 the reasonableness of BPH determinations and conclusions is  
8 appropriate, even when such determinations and conclusions are  
9 accorded broad deference. (See, e.g., In re Farley (2003) 109  
10 Cal.App.4th 1356, 1361-2: "Judicial review of a CDC custody  
11 determination is limited to determining whether the classification  
12 decision is arbitrary, capricious, irrational, or an abuse of the  
13 discretion granted those given the responsibility for operating  
14 prisons. While we must uphold respondent's classification action  
15 if it is supported by "some evidence" and we must afford great  
16 deference to an administrative agency's expertise, where the agency's  
17 interpretation of the regulation is clearly arbitrary or capricious  
18 or has no basis, COURTS SHOULD NOT HESITATE TO REJECT IT."

19 Federal courts likewise require parole decisions to be  
20 reasonable. As an example, in a parole rescission case, a federal  
21 court in this state held: "the Court of Appeals conclusory findings  
22 that there was 'some evidence' to support the rescinding, the BPH's  
23 decision that parole was improvidently granted to petitioner are  
24 contrary to clearly established federal law and, to the extent they  
25 are fact-based, represent unreasonable determinations of the facts  
26 in light of the evidence presented in the state court proceedings."  
27 Stockton v. Hepburn (N.D. Cal. 2005) 2005 U.S. Dist. LEXIS 4877 at  
28 43; see also Irons v. Warden (N.D. Cal 2004) 358 F.Supp.2d 936,

1 948 ("Clearly, a conclusion by lay BP[H] commissioners that  
2 petitioner has not yet achieved required therapy for insight OR  
3 OTHER REASONS is not reasonably sustainable, and a state court's  
4 conclusion to the contrary is patently unreasonable.")

5 The federal liberty interest is made an adjunct to the state  
6 requirements of due process by and through the 14th Amendment to  
7 the U.S. Constitution and the substantial evidence of the federal  
8 standard must be overcome to meet federal guarantees to its citizens  
9 who, before they became entitled to state civil rights, were first  
10 bestowed by operation of their federal citizenship. A state cannot  
11 lawfully deny any federal right to its citizens but that is exactly  
12 what respondents are demanding of their agents in the BPH, and will  
13 no doubt now ask this Honorable Court to sign off on. That must not  
14 be allowed if the judiciary is to be truly separated from the  
15 Executive charades disguised as a legitimate exercise in freedom.

16 The goal of indeterminate sentences and the parole system is  
17 not only to punish, but also to provide for reformation and  
18 rehabilitation as the CDC's renaming suggests:

19 "The belief no longer prevails that every offense in  
20 a like legal category calls for an identical punishment  
21 without regard to past life and habits of a particular  
22 offender. ... Retribution is no longer the dominant  
23 objective of the criminal law. Reformation and  
24 rehabilitation of offenders have become important goals  
25 of criminal jurisprudence."

26 People v. Morse (1964) 60 Cal.2d 631, 643 n.8 (quoting Williams  
27 v. State of New York (1949) 337 U.S. 241, 247). In a lengthy discussion  
28 of this topic, the Supreme Court stated the following:

29 "[T]he purpose of the indeterminate sentence law, like  
30 other modern laws in relation to the administration  
31 of criminal law, is to mitigate the punishment which  
32 would otherwise be imposed upon the offender. These  
33 laws place emphasis upon the reformation of the offender.

1 They seek to make the punishment fit the criminal rather  
2 than the crime. They endeavor to put before the prisoner  
3 great incentive to well-doing in order that his will  
4 to do well should be strengthened and confirmed by the  
5 habit of well-doing. [...] [The] interests of society  
6 require that under prison discipline every effort should  
7 be made to produce a reformation of the prisoner. ...  
8 The legislative policy [was to provide a system whereby]  
9 a hope was to be held out to prisoners that through  
10 good conduct in prison and a disposition shown toward  
11 reformation, they might be permitted a conditional liberty  
12 upon restraint under which they might be restored  
13 again to society. ... Although good conduct while in-  
14 carceratd and potential for reform are not the only  
15 relevant factors, this court has acknowledged their  
16 significance. Furthermore, the Authority has declared  
17 that these factors are among those of 'paramount impor-  
18 tance. In re Minnis, 7 Cal.3d 644-45.

11 The Rosenkrantz Court, at 656, citing to Minnis, reaffirmed  
12 these principles: "[E]ven before factors relevant to parole de-  
13 cisions had been set forth expressly by statute and regulations,  
14 we concluded that '[a]ny official or board vested with discretion  
15 is under an obligation to consider all relevant factors [], and  
16 the [BPH] can't, consistently with its obligation, ignore post-  
17 conviction factors UNLESS DIRECTED TO by the Legislature." (citing  
18 Minnis at 645; emphasis added for illumination).

19 Petitioner has a Constitutional liberty interest in parole  
20 decisions and "[P]arole applicants in this state have an expectation  
21 that they will be granted parole unless the BPH finds, in its  
22 reviewable discretion, that they are unsuitable for parole in light  
23 of the circumstances specified by statute and regulation."  
24 Rosenkrantz at 654 and at 659-61 this liberty interest is an  
25 expectation protected by due process of law. (holding that the  
26 California Constitution Art. V, §8(b) and PC §3041 "give rise to  
27 a protected liberty interest" in that "a prisoner granted parole  
28 by the BPH has an expectation that the Governor's decision to affirm



1 modify, or reverse the BPH's decision will be based upon the same  
2 factors the BPH is required to consider," and that "this liberty  
3 interest underlying a Governor's parole review decision is protected  
4 by due process of law.").

5 Federal courts have also unequivocally held that California's  
6 parole system gives rise to a liberty interest constitutionally  
7 protected by due process. See: Allen, infra at 376-78; Greenholtz  
8 v. Inmate of Neb. Penal & Corr. Complex (1979) 442 U.S. 1, 11-12  
9 (holding a state's statutory parole scheme that uses mandatory  
10 language may create a presumption that parole release will be  
11 granted upon certain circumstances or findings, thus giving rise  
12 to a constitutionally protected liberty interest); McQuillen, supra  
13 at 902-3 n.1 (holding that because parole scheme uses mandatory  
14 language and is largely parallel to the schemes found in Allen  
15 and Greenholtz do give rise to a protected liberty interest in RELEASE  
16 ON PAROLE, "California's parole scheme gives rise to a cognizable  
17 liberty interest in release on parole.") Biggs v. Terhune (9th  
18 Cir. 2003) 334 F.3d 910, 914-15 (same) and, ("[t]he liberty interest  
19 is created, not upon the grant of a parole date, but upon the  
20 incarceration of the inmate."

21 Rosenkrantz specifically rejected any position that a court  
22 may not properly examine the factual basis of parole decisions  
23 at 667, "[W]e conclude that the courts properly can review a  
24 Governor's decisions whether to affirm, modify, or reverse a parole  
25 decision by the BPH to determine whether they comply with due  
26 process of law, and that such review properly can include a determi-  
27 nation of whether the factual basis of such a decision is supported  
28 by some evidence in the record that was before the BPH.

1 Post-Rosenkrantz, courts have reaffirmed the concepts of broad  
2 executive deference but vigilant judicial review, by engaging care-  
3 ful analysis, will ensure that the boundaries of due process are  
4 respected and upheld. "[t]he exceedingly deferential nature of  
5 the "some evidence" standard of judicial review set forth in  
6 Rosenkrantz does not convert a court reviewing the denial of parole  
7 into a potted plant." In re Scott (119 Cal.App.4th 871, 898, re-  
8 cently affirmed).

9 The Court, in In re Dannenberg (2005) 34 Cal.4th 1061 at 1095  
10 n.16 reaffirmed that effective judicial review is critical to due  
11 process. Rejecting the dissent's suggestion that the opinion "per-  
12 mits untethered pro forma parole denials that are insulated from  
13 effective judicial review, thus contravening California life in-  
14 mates' due process rights to individualized parole consideration,"  
15 the majority made clear that the [BPH] must apply detailed standards  
16 in evaluating individual inmates' suitability for parole on public  
17 safety grounds, and that the Executive's broad discretion is subject  
18 to meaningful judicial oversight.

19 There is no question that the discretion afforded to the BPH  
20 with respect to parole decisions is great. However, the parole  
21 system's very purpose is to provide for the reentry into society  
22 of inmates who no longer pose a danger or unreasonable threat to  
23 public safety, and those rights afforded thereunder are  
24 constitutionally protected.

25 The BPH must abide by due process considerations, and the  
26 courts are entrusted with ensuring that such considerations are  
27 adequately respected and thus protected. Neither Rosenkrantz or  
28 Dannenberg permits respondents to immunize themselves from re-

1 view by unreasonable and possibly unlawful assertion that certain  
2 facts support a denial of parole. On the contrary, Rosenkrantz  
3 and Dannenberg make clear that the courts have a vital and therefore  
4 important role to play in ensuring that parole decisions are  
5 actually supported by "some evidence" having a basis in fact, and  
6 an indicia of reliability supported in the record.

7       Petitioner submits that there is a real danger that, improperly  
8 understood, the guidelines articulated in Rosenkrantz, Dannenberg,  
9 and the court of appeals will serve to provide respondents with  
10 de facto immunity from judicial review, a result anathema to state  
11 and federal due process protections. Properly understood, the "some  
12 evidence" standard provides a fair and proper framework for review  
13 of parole decisions in any venue, one that provides respondents  
14 with an appropriate level of deference in making extremely difficult  
15 decisions relating to inmates' liberty interests and public safety  
16 concerns, while ensuring that statutory and constitutional liberty  
17 interests are being adequately and lawfully safeguarded through  
18 judicial review. And, when this standard is properly applied to  
19 this case, there should be no doubt but that the BPH's denial of  
20 suitability seems unsustainable and must be reversed, a new hearing  
21 granted, and an Order with instructions issued.

22       WHEREFORE, Petitioner prays that the writ be granted in full  
23 and all available relief be accorded to Petitioner to comply with  
24 and comport to the state and federal Constitutions and the legal  
25 adversarial process and resolution of a judicious nature in this  
26 most important matter herein. Petitioner hereby incorporates by  
27 reference, as though fully set forth, all papers, pleadings,  
28 transcripts, exhibits and matters of record in the instant matter.

7. Ground 2 or Ground -3- (if applicable)

PETITIONER HAS A FEDERALLY-COGNIZABLE LIBERTY INTEREST IN RELEASE  
TO PAROLE CREATED BY RESPONDENT'S STATUTORY SCHEME AND MANDATORY  
LANGUAGE OF THE ENABLING STATUTES THAT REQUIRES A SUITABILITY FINDING  
UNDER STATUTORY CRITERIA AND RESPONDENTS' BURDEN IS NOT MET HEREIN

a. Supporting facts:

This petition is intended to give legitimate meaning to petition-  
er's seven (7) years-to-Life sentence by seeking an Order in this  
Court granting the writ to discharge petitioner from state prison,  
or alternatively, compelling the BPH to conduct a new parole  
consideration hearing and correctly weight their statutory findings  
to view suitability and consequent release to parole for Petitioner.

The issues raised are of constitutional dimension, comporting  
to petitioner's federal constitutional rights, and questioning the  
legality of petitioner's continued confinement in the face of over-  
whelming evidence of legally-sustainable proof of suitability and  
unquestioned state-hired professionals and their proffered opinions  
of reasonable assurance in adhering to concerns of public safety.

There is NO evidence having indicia of reliability that this  
petitioner poses an unreasonable risk of danger to the public and  
P.C. §3041(a) and California Code of Regulations (CCR), Title 15,  
Division II §§2402(d)(1,2,3,4,6,7,8 & 9) (parole suitability criteria)  
all make it clear that there IS A MANDATE, based on a legally-  
sufficient standard, and that standard is subject to judicial review  
(continued on attached pages)

b. Supporting cases, rules, or other authority:

(SEE ATTACHED POINTS AND AUTHORITIES)



(continued from previous page):

for abuse of discretion under a federal due process and equal protection umbrella with safeguards required in a review of the "evidence" of unsuitability that is burdened upon respondents.

The California Supreme Court recognizes that prisoners have procedural due process protections in connection with parole determinations. A legitimate expectancy of release to parole is created by PC § 3041. If the statute creates the legitimate expectancy of parole, it is not legally sufficient to answer that the BPH may, in its broad discretion, deny parole suitability.

This argument, that the BPH's broad discretion swallowed Petitioners liberty interest and expectation of release was squarely rejected by the High court in Allen, supra. Additionally, the Court stated in Rosenkrantz IV: "[P]arole applicants in this state *Have an expectation that they will be granted parole* unless the BP[H] finds in its discretion, that they are unsuitable for parole **in light of the circumstances specified by statute and regulation.**" Rosenkrantz V, supra, 29 Cal.4<sup>th</sup> at 654. And, [O]ur past decisions make clear that the **requirement** of procedural due process embodied in [Art. I, § 7, subd. (a)], places some limitations upon the broad discretionary authority of the BP[H]." Id. at 655.

Therefore, it is inherently clear that the presence of discretion held by the BPH does not, under either state or federal law, diminish nor extinguish the expectancy of release to parole nor in any ways Petitioner's due process rights. It thus follows that a liberty interest has existed under PC § 3041 that is embodied in, and protected by, the Fourteenth Amendment's Due Process Clause.

Also, CCR regulations use the "shall/unless" language (§§ 2401-2402) and recognize all available rights to Petitioners. Further, these regulations AS ORIGINALLY WRITTEN, made it even clearer that parole was to normally to be granted. This remained so until political operatives, presumably with a criminal bent, manipulated the executive and legislative branches to repeal this proviso and substitute a "Willie Horton" revision that was never fully explained to the public nor openly voted upon for acceptance and would've probably failed if there had been an honest attempt to do so.

For respondents to abrogate this federal liberty interest they must provide *substantial* relevant, reliable evidence having some indicia of credibility that Petitioner poses a CURRENT **unreasonable** threat to the public safety, as noted in In re Lee (10-10-06) Second District Court of Appeals, Division Eight; 49 Cal.Rptr.3<sup>rd</sup> 931,

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where the court cautioned:

["The commitment offense can negate suitability [for parole] only if circumstances of the crime ... rationally indicate that the offender will present an unreasonable public safety risk if released from prison."] In re Scott (2005) 133 Cal.App.4<sup>th</sup> 573, 595, [however], In re Lowe (2005) 130 Cal.App.4<sup>th</sup> 1405, suggested "some evidence" applies to the factors, not dangerousness.) Some evidence of the existence of a particular factor does not necessarily equate to some evidence the [inmate's] release unreasonably endangers public safety." Lee, supra, 936.

¶[The board and governor must focus their parole decisions on whether a prisoner continues to pose an unreasonable risk to public safety. Such a practical inquiry, rooted in real world crime and law and order, has no obvious intersection with incorporeal realm of legal constructs." Id. at 940.

This is something they have patently failed to do, as testified to by virtually all of their own witnesses as noted in attached Exhibit "C", which has been previously generated BY RESPONDENTS and provided to all concerned parties prior to Petitioner's various hearings and with NO OBJECTIONS from respondents as being accurate and meaningful to ascertain PRESENT DANGEROUSNESS.

"Unreasonable risk" evidence that meets the federal level of reliability must be drawn from an individualized analysis of fifteen (15) factors identified by regulations: CCR § 2402(b); Rosenkrantz V at 653-54. "Such information shall include circumstances of the prisoner's social history; past and present mental state; past criminal history; [] the base and other commitment offenses; past and present attitude toward (sic) the crime; any conditions of treatment or control ...; and any other information that bears on the prisoner's suitability for release." (emphasis added.)

This extensive list of factors, including other relevant reliable information that must be considered, makes it clear that the Legislature did not intend for any single factor to initially or consistently trump all the others. This is exactly what is happening here however. Decision upon decisions by the BPH suggests that their focus is exclusively on the commitment offense, a sub-factor among the total. The BPH insistently attempts to insulate their failure to individually consider circumstances of suitability using makeweight exceptions to state by rote that, 'although post-conviction behavior was DULY CONSIDERED, and the inmate is otherwise suitable for release to parole, the offense was so heinous, atrocious, or cruel, that Petitioner is ineligible for a finding of suitability. "The evidence under-lying the BPH's decision must have some indicia of reliability." Jancsek v. Oregon Board of Parole (9<sup>th</sup> Cir. 1987) 833 F.2d 1389, 1390.

The reduction of the parole assessment process to an occluded, myopic pseudo-consideration of the

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one factor, and it alone—unerringly as an unwritten but accepted general rule practiced in all circumstances—was never intended by the Legislature and cannot be permitted nor allowed to continue and still comport with Rosenkrantz, Biggs, Martin, Morrall, Irons, Coleman, et cetera. See also: Environmental Defense Center, Inc. v. E.P.A. (2003) 344 f.3d 832, 858, fn. 36, (holding that a federal agency has acted in an arbitrary and capricious fashion, if “the agency has relied on factors that Congress has not intended to consider, entirely failed to consider an important aspect of the problem, and offered no explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a different view or the product of agency expertise.”); Arizona Cattlegrower's Ass'n v. U.S. Fish & Wildlife, B.L.M. (9<sup>th</sup> Cir. 2001) 273 F.3d 1229, 1236 (holding judicial review under the “arbitrary and capricious” standard is “meaningless ... unless we carefully review the record to ensure that agency decisions are founded on a reasoned evaluation of the relevant factors ...[:] while reviewing courts should uphold reasonable and defensible constructions of an agency's enabling act, they must not rubber-stamp ... administrative decisions that they deem in-consistent with a or that frustrate the congressional policy underlying a statute.”)

First degree murder is not a crime that automatically allows one to be deemed unsuitable for release and parole. And, given the above directive in Environmental Defense Center, Inc. v. E.P.A and Arizona Cattlegrower's Ass'n v. U.S. Fish & Wildlife, B.L.M., coupled with Rosenkrantz, Biggs, Martin, Morrall, Irons, Coleman, et al., there must be a base set of factors upon which a first degree murderer would have to be paroled or the BPH would risk violating due process. To determine what would qualify as more than the minimum necessary for a conviction, the courts must first consider what is required, at the minimum, for a conviction of first-degree murder.

Now that the crime is defined, the question must be what evidence indicates that any particular first degree murder was somehow “beyond the minimum necessary to sustain a conviction.” In sum: what evidence indicates the commitment offense was “**especially** heinous” or “**exceptionally** grave”, given that there typically must be a finding of some level of heinousness, callousness, and/or gravity of violence in order for a defendant to have had his first degree murder conviction sustained by the appellate courts in the first place?

Two previous panels found Petitioner suitable long ago and the only changes to these original grants has been a continued progress towards maturity, self-awareness, anger management and the kind of programming

C

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1 which will assure Petitioner's continued positive behavior and determination and almost certain success as a  
2 parolee and valuable contributing member of the community.

3 The weapon enhancement does not reasonably demonstrate that this crime was "beyond the minimal  
4 elements" of a first-degree murder conviction, and is in no way some evidence establishing that he is currently an  
5 unreasonable threat to public safety. Indeed, if the BPH were to be able to rely on "weapon of choice" evidence  
6 in every case, **every** first degree murder would be "beyond the minimal elements" and there would be no way to  
7 commit a first degree murder in California that did not qualify as an "especially" heinous crime and thereby justify  
8 imprisonment for life, without any chance of parole. This is not what the Legislature wrote the enhancement  
9 statutes for nor the intended outcome of any additional punishment attached thereto, and exceeds the bounds of  
10 common sense in every conceivable manner.

11 This rendition illustrates further, the importance (given the short tenure of the suggestion that "some  
12 evidence" may be found in facts 'beyond the minimum necessary elements' of the commitment offense) of all  
13 courts providing enhanced guidance regarding what set of facts are sufficient to support a denial of parole  
14 suitability. Invariably, any such guidance should summarily relate to the relevance of the evidence; whether or  
15 not it is substantial for federal due process purposes; its relevance and its reliability; and the reasonableness one  
16 should exact in being able to conclude that the evidence sub-stantiates that the inmate is a CURRENT,  
17 UNREASONABLE THREAT to the safety and security of the public and the ability to lawfully abide within the  
18 community.

19 Sole reliance on the commitment offense to deny parole not only augurs the serious risk of being  
20 arbitrary AND capricious but is almost always counter-instructive. In the parole determination process, the panel  
21 is tasked with assuring the Executive branch the parole-worthy inmate was duly considered by determining if the  
22 prisoner is a CURRENT threat to the public safety. This determination is, in total, the only decision that the BPH  
23 is sanctioned to make by the Penal Code and Regulations codified for that purpose. All interpretations of  
24 mitigating and aggravating factors, and the weight given to the special circumstances of the offense, merely go  
25 to instruct this final conclusion. "A determination of unsuitability is simply shorthand for a finding that a prisoner  
26 CURRENTLY would pose an unreasonable risk of danger if released at this time." Smith, supra, at p. 370, (citing  
27 C.C.R. § 2402(d), emphasis added.)

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1 WHEREFORE, Petitioner respectfully submits these issues, arguments and Exhibits and prays this  
2 Honorable Court and all Honorable Justices will grant the writ and Order Petitioner's release forth-with. Or, in the  
3 alternative, Order a Rehearing within thirty (30) days of the Order with instructions to individualize his complete  
4 suitability consideration without bias or political, personal, or tenorial consid-erations, and in accordance with the  
5 statutory mandate of P.C. § 3041(a), and any further relief as the Court may deem just and proper to protect  
6 Petitioner's civil rights.

7 ///

8 ///

9 ///

8. Did you appeal from the conviction, sentence, or commitment? ☐ Yes. ☐ No. If yes, give the following information:

a. Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court"):

b. Result: N/A c. Date of decision: \_\_\_\_\_

d. Case number or citation of opinion, if known: \_\_\_\_\_

e. Issues raised: (1) \_\_\_\_\_

(2) \_\_\_\_\_

(3) \_\_\_\_\_

f. Were you represented by counsel on appeal? ☐ Yes. ☐ No. If yes, state the attorney's name and address, if known:

9. Did you seek review in the California Supreme Court? ☐ Yes. ☐ No. If yes, give the following information:

a. Result: N/A b. Date of decision: \_\_\_\_\_

c. Case number or citation of opinion, if known: \_\_\_\_\_

d. Issues raised: (1) \_\_\_\_\_

(2) \_\_\_\_\_

(3) \_\_\_\_\_

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:

THESE ISSUES ARE BEING TIMELY MADE FOR THE FIRST TIME ON THIS APPEAL

11. Administrative Review:

- a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].) Explain what administrative review you sought or explain why you did not seek such review:

THERE IS NO ADMINISTRATIVE REMEDY AVAILABLE TO PURSUE

b. Did you seek the highest level of administrative review available? ☐ Yes. ☐ No.

Attach documents that show you have exhausted your administrative remedies.